

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

CORKTOWN HOTEL, LLC, a
Michigan limited liability company,

Plaintiff,

Case No: 18-002677-CB
Hon. Brian R. Sullivan

-vs-

CASPIAN/COLUMBIA CONSTRUCTION
GROUP, INC., a foreign corporation, ROK
CONSTRUCTION SERVICES, LLC, a
Michigan limited liability company, PATRICK
THOMPSON DESIGN, INC., a Michigan
corporation, STRATEGIC ENERGY SOLUTIONS,
INC., a Michigan corporation and EXCEL
PLUMBING, LLC, a Michigan limited liability
company,

Defendants.

**ORDER GRANTING DEFENDANT, STRATEGIC ENERGY
SOLUTIONS, INC.'S MOTION FOR SUMMARY DISPOSITION**

At a session of said Court, held in the City
County Building, City of Detroit, County of
Wayne, State of Michigan, on
6/10/2019

PRESENT: HONORABLE BRIAN R. SULLIVAN

The question presented in this case is whether the contract between plaintiff Corktown Hotel, LLC (Corktown) and defendant Strategic Energy Solutions, Inc. (SES) excludes work in guest bathrooms, the area plaintiff claims SES was responsible for and where damages were incurred, or whether the contract was ambiguous. Plaintiff sued SES

for both breach of the June 21, 2015 contract (Count IV) entered into by plaintiff and defendant and alternatively for negligence (Count VI) because the fixtures installed in the guest bathrooms did not comply with City code and no permit was obtained prior to installation. The fixtures were changed to comply with code at a cost to plaintiff of over \$250,000.00.

The court holds the contract between plaintiff and SES specifically excluded work in the hotel guest bathrooms from the scope of its performance. Nor can plaintiff pursue a remedy in negligence against defendant because the subject matter is expressly covered in their contract. Defendant SES' motion for summary disposition on both counts is granted.

FACTS

Plaintiff Corktown Hotel, LLC (Hotel) purchased the old Holiday Inn located at 1331 Trumbull Avenue in the City of Detroit on October 20, 2014. The hotel needed to be renovated. Plaintiff hired numerous entities to work on that project. Plaintiff entered into contracts with defendants: (i) Caspian/Columbia Construction Group, Inc. (Caspian) to serve as the general contractor; (ii) ROK Construction Services, LLC (ROK) for construction management services; (iii) Patrick Thompson Design, Inc. (Thompson) for interior design services; (iv) Excel Plumbing, LLC (Excel) for plumbing work, and after Excel was terminated; with (v) (non-party) JB Plumbing to complete the plumbing work of

Excel.

Plaintiff also had a contract with SES, written on Strategic Energy Solutions letterhead, dated June 2, 2015 and signed by Steve DiBerardine of SES. It was signed by Corktown Hotel on June 4, 2015.

The project description in that contract was identified as “engineering for mechanical, electrical, plumbing and fire protection systems (MEP) ... of 8,000 square feet of public spaces ... including the lobby, lounge, bar and restaurant.” “Renovations of guest rooms are not included in this proposal.” (Contract,page2).

The heading “The scope of Work” included: (i) mechanical, electrical and plumbing (MEP) documents; (ii) an evaluation of a “a typical guest room;” and (iii) a consult with the team with recommendations on MEP systems. (Contract, page 1).

The MEP services provided by SES included: a) Coordination of toilet room plumbing fixtures, specifications with interior design; b) Coordination with kitchen, bar and café plumbing fixture specifications by others; c) Design domestic hot and cold water distribution and forward design of sanitary, waste and vent piping; and fire protection system.

While the above two paragraphs when read in isolation could be read to include the

bathroom fixtures of the guest rooms, a separate paragraph on page 2 of that contract indicated “SCOPE OF SERVICES NOT INCLUDED.” Under that sub-heading of plumbing the contract states: “Rework of guest room toilet rooms.”

Patrick Thompson testified he thought the initial fixtures would meet City requirements because they were installed under a “rehabilitation code” as opposed to the building code.

The guest room bath fixtures in the shower did not comply with the anti-scalding code requirement in the City of Detroit Code. Guest rooms are excluded in the SES contract. Hence, the fixtures in them are excluded. On June 2, 2017 the City of Detroit cited plaintiff for code violation of the bath/shower fixtures and valves in each of the 144 guest bathrooms. The violations to the code were: (i) the failure to get plumbing permits; and (ii) the old fixtures/valves needed to be replaced with an integrated hot/cold fixture.

Patrick Thompson Design contracted with Corktown for interior design services and chose the fixtures for the hotel bathrooms not SES. Patrick Thompson testified it hired House/Semen Architects, PLLC to be the architect of record for the Corktown project, and House/Semen was to perform code review analysis and provide adequate drawings to the City of Detroit. Patrick Thompson testified House/Semen never performed that service.

SES was not retained to perform that service. Thompson testified that SES was not

involved in the hotel rooms (guest wing) of the hotel and was not involved with any of the guest room bathroom fixtures. (See Deposition of Patrick Thompson, page 33-34). Thompson said SES was hired as an MEP consultant:

Q. For what part of the project?

A. The public spaces, the restaurant, and first floor.

Q. Not the guest rooms, right?

A. Correct, as far as I know.

Dana Purifoy testified on behalf of Excel Plumbing that no City plumbing permit was pulled for the job. Purifoy testified that the fixtures he was ordered to get from Atlas Plumbing would not meet Detroit City Code and he told plaintiff.

Excel installed the fixtures on two floors of the hotel when he was informed by an inspector that the fixtures violated City code. Excel passed that information on to the owner. Excel was terminated and replaced with JCB Plumbing.

SES moved for summary disposition claiming it was not responsible for the renovation, where plaintiff's problem lay, contractually, and was not negligent. Plaintiff claims SES is liable in both contract and negligence because the contract is ambiguous and the defendant should have designed the shower/bath fixtures to meet City code.

SES contends the contract for the project description specifically and expressly excludes anything done in the hotel guest rooms and was limited to only the first floor public space. The project description states “Renovation of guest rooms is not included in this proposal.” Moreover, the scope of services specifically not included was plumbing: “re-work of guest room toilet rooms.”

MCR 2.116(C)(10)

A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Maiden v Rozwood*, 461 Mich 109, 120 (1999). Under this sub-section the trial court considers the affidavits, pleadings, depositions, admissions, documentary and other evidence submitted by the parties. See *Maiden*, 461 Mich at 120; MCR 2.116(C)(10)(G)(5). That evidence must be considered in a light most favorable to the party opposing the motion. *Maiden*, 461 Mich at 120. If the proffered evidence fails to establish a genuine issue regarding any material fact the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10),(G)(4); *Quinto v Cross and Peters Company*, 451 Mich 358 (1996).

When a motion is brought under sub-rule (C)(10) the adverse party may not rest on mere allegations or denials of the pleadings but must, by evidence or affidavits, or as provided for in the rules, set forth specific facts demonstrating a genuine issue for trial. *Maiden*, 461 Mich at 120-121. If the adverse party fails to respond judgment shall be entered against him or her. A litigant’s pledge to establish an issue of fact cannot survive

summary disposition under (C)(10). *Maiden, supra*. A court, under (C)(10), must consider the substantively admissible evidence proffered in opposition to the motion. A promise or mere possibility the claim will be later supported evidence is insufficient under the court rule. *Maiden*, 461 Mich at 121. The court must consider the substantively admissible evidence offered in opposition to the motion.

III. LAW

Corktown sued SES for breach of contract. The essential elements of a contract are: 1) parties competent to enter into the contract; 2) proper subject matter; 3) legal consideration; 4) mutuality of agreement and mutuality of obligation. *Thomas v Leja*, 187 Mich App 418 (1991). Corktown must demonstrate SES breached the contract with Corktown and Corktown suffered damages from that breach. See *Miller Davis v Ahrens Construction Inc.*, 495 Mich 161 (2014).

Contracts must be enforced according to their terms. See *Burkhart v Bailey*, 260 Mich App 636 (2004). Construction of a contract is a question of law for the court. See *Meagher v Wayne State University*, 222 Mich App 700 (1997); *Henderson v State Farm Fire and Casualty Company*, 460 Mich 348, 353 (1999).

Language of a contract that is clear and unambiguous must be enforced as written.

Egbert R. Smith Trust, 480 Mich at 24. A contract is unambiguous if it meets of one interpretation, even if it is unartfully worded or poorly arranged. *Holmes v Holmes*, 281 Mich at 575, 594 (2008). Every word, phrase and clause in a contract must be given effect and an interpretation that would render part of it nugatory or void should not be employed. *Farm Bureau General Insurance Company v Blue Cross Blue Shield*, 314 Mich App 12, 20-21 (2016); *Klapp v United Insurance Group Agency, Inc.*, 468 Mich 459, 460 (2003). Where contractual language is clear and unambiguous the construction of it is a question of law for the court. *Quality Products and Concepts Company v Nagle Precision, Inc.*, 469 Mich 362, 375 (2003); *Meagher v Wayne State University*, 222 Mich App 700, 721 (1997).

A contract is not ambiguous if it fairly admits of but one interpretation. *Meagher*, 222 Mich App at 722. If it admits more than one reasonable interpretation it is ambiguous. A court must give effect every word, phrase and clause in the contract and avoid an interpretation that would render any part of the contract surplusage or nugatory. *Klapp v United Insurance Group Agency, Inc.*, 468 Mich 459, 468 (2003). The court evaluates the language of a contract in accordance with its plain and ordinary meaning to ascertain the intent of the parties. *Rory v Continental Insurance Company*, 473 Mich 457, 461 (2005); *In Re Egbert R. Smith Trust*, 480 Mich 19, 24 (2008).

Plaintiff contends that the contract with SES is ambiguous because it is capable of more than one reasonable interpretation. The court does not agree. The contract specifically identifies what is included in the services provided by SES and what is

excluded from the scope of the work it is to perform. The bathrooms for the guest rooms of the hotel were specifically and expressly excluded in the contract. There is no evidence SES was involved with the guest room plumbing fixtures and did not contract to do so. No reasonable person could conclude that SES was involved in that part of the project or it's reworking. The contract specifically excludes, in numerous places, the area plaintiff claims was involved in the breach, installation of non-code bath (shower) fixtures. There is no genuine issue as to any material fact, no evidence SES did not do any work in that area and did not contract to do so. Plaintiff cannot recover for breach of contract. Defendant's motion is granted. MCR 2.116(C)(10).

Plaintiff also sued SES under a theory of negligence. In order to recover on a negligence theory plaintiff must demonstrate the defendant owed plaintiff a duty of care; 2. That the defendant breached that duty of care; 3. That the plaintiff suffered an injury; and 4. That the defendant's breach was a proximate cause of plaintiff's injury caused by defendant. See *Henry v Dow Chemical Company*, 473 Mich 63 (2005).

Duty is a legal relationship between the parties by which the defendant is required to conform its conduct for the benefit of the plaintiff. See *Clark v Dalman*, 379 Mich 251 (1967). If defendant owed no duty to plaintiff, summary disposition is proper. *White v Beasley*, 453 Mich 308, 324 (1996).

Defendant owed no professional duty of care (tort) to Corktown independent of the

contract. The subject matter of this alleged tort is covered by specific provisions of the contract between Corktown and SES. A tort action cannot be maintained by parties to a contract for breach of that contract unless plaintiff demonstrates a duty separate and distinct from the contractual obligation. *Hart v Ludwig*, 347 Mich 559, 563 (1956); *Roberts v Auto Owners Insurance Company*, 422 Mich 594, 603 (985). The tort 'duty' must be premised on a breach of duty distinct from the contract. *Roberts*, 422 Mich at 603. No such duty exists in this case. The relationship is contractual only. See *Rinaldo's Const. Corp. v Mich Bell Telephone*, 454 Mich 65, 83-84 (1997).

Plaintiff's recovery on negligence is therefore precluded. *Hart v Ludwig*, 347 Mich 559, 563 (1956); *Foley v Union Commerce Assoc.*, 470 Mich 460 (2004); MCR 2.116(C)(10).

The count of negligence in plaintiff's complaint is dismissed pursuant to MCR 2.116(C)(7),(8) and (10); and

IT IS SO ORDERED.

/s/ Brian R. Sullivan 6/10/2019

BRIAN R. SULLIVAN
Circuit Court Judge

ISSUED: